United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7221

To be argued by
THOMAS M. McCAFFREY

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IVANUS MELIOTAS, Administrator and Personal Representative of the Estate of ANTHANASSIOUS KARRAS, Deceased,

Plaintiff-Appellant,

—against—

ACTIS COMPANY, LTD. and JOHN KARRAS and KARRAS COMPANY, INC.,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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Cases Cited

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Statement

Plaintiff-Administrator filed suit on June 27, 1975 for damages arising out of the death of Athanassios Karras which occurred on July 11, 1973. Defendants moved to dismiss on the ground of forum non conveniens and other grounds. The Honorable Constance B. Motley granted the motion to dismiss on the ground of forum non conveniens and issued a memorandum opinion dated April 26, 1976. A proviso was that defendants appear in the appropriate Greek or Liberian court as selected by plaintiff and

that defendants not interpose a time limitation defense in whichever forum is chosen. Defendants agree to that proviso.

Facts

Athanassios Karras signed a Seafarer Employment Contract dated June 21, 1972 (9a, 10a of Appendix). He joined the vessel AQUACHARM as an able seaman on June 22, 1972 at Amsterdam (17a). In the course of the voyage the vessel stopped at Baltimore, Maryland to receive a cargo of soya beans and corn. She sailed from Baltimore on July 2, 1973 bound for Amsterdam (5a).

On July 11, 1973 the vessel was near the coast of England and Chief Officer Georgios Priftis was conducting an inspection of the ship's holds. At one point, the bosun, Platon Laios, either climbed into or fell into Hatch No. 7 and apparently lost consciousness. Mr. Karras went to the assistance of Mr. Laios, and Mr. Karras himself lost consciousness. Both men are believed to have been overcome and to have fainted. After being removed from the hold, Mr. Laios regained consciousness but Mr. Karras expired (5a, 6a).

Medical assistance was summoned from Great Britain and a doctor arrived aboard by helicopter and Mr. Karras was pronounced dead. His body was taken to England and later repatriated to Greece while the vessel continued to Amsterdam. This action was filed in the Southern District of New York on June 27, 1975, almost two years after the event (6a, 1a).

The vessel AQUACHARM is registered under the laws of the Republic of Liberia and flies the Liberian flag. It is owned by Actis Company, Ltd., a corporation duly organized and existing under the laws of Liberia, having its

principle office and place of business at Monrovia, Liberia. None of the officers, directors or stockholders of Actis is a citizen or resident of the United States. Actis Company, Ltd., does not maintain an office in the United States and did not have an office in the United States on July 11, 1973. Actis has no one named John Karras as an officer, director, stockholder or agent. Actis has no connection or relationship with a company named Karras Company, although there is a company named Carras (Hellas) Ltd., with an office in Piraeus, Greece which acts as Actis' agent (16a, 17a, 18a).

The AQUACHARM made nine visits to U. S. ports in 1973, four visits in 1974 and three visits in 1975. On July 11, 1973 Actis owned four other vessels of foreign registration, foreign flag and foreign ownership (16a).

None of the crew of the AQUACHARM in July 1973 was an American citizen. Of the 28 officers and crew, 22 were from Greece and 6 from the Phillipines (5a, 17a). Decedent listed his address as Kyra Vrisi Karditsa, Greece (9a).

POINT I

All of the reasons to retain jurisdiction including making the trial easy, expeditious and inexpensive are totally lacking.

In *Noto* v. *Cia Secula* (Tanker Luisa), 310 F. Supp. 639, 1970 A.M.C. 319 (SDNY, 1970), Judge Weinfield dismissed actions based on the deaths of a number of foreign seamean against foreign companies, whose ship was Italian registery. After discussing the basis for dismissal forum non conveniens at length, the Court said at p. 650:

> "The Courts would be derelict if they supinely stood by, aware that improper practices had flooded their dockets with litigation that truly belongs in another forum. The courts have 'inherent power to protect themselves from a deluge of litigation by nonresidents, inspired by contingent retainers to avoid or overcome foreign laws and interpretation and application thereof by foreign courts. Thus, the circumstances which lead to the retention of plaintiffs' lawyers in this district and the subsequent filings of the action here, give added reason for declining jurisdiction."

The same principle was reiterated by Judge Palmieri in *Fitzgerald* v. *Zim Israel,* 1975 A.M.C. 1425 (S.D.N.Y. 1975), when he said at page 1430:

> . . ."To invoke American law solely on the possibility of more generous relief for the plaintiff would transgress the very notion of international comity upon which the law of admiralty rests. See *Lauritzen,* supra, 345 U.S. at 581-2. The contacts between the events in this case and the United States are either fortuitous or completely insubstantial. There is no ground for the assertion of this court's jurisdiction under the Jones Act, the Death on the High Seas Act, or General Maritime Law". . .

Fitzgerald v. *Zim Israel,* supra, involved an Israeli flag vessel owned by an Israeli company, and the vessel was on the high seas at the time of the plaintiff's accident. The U. S. Coast Guard was summoned for assistance and an autopsy was performed at Honolulu. In addition there was a 25 percent American interest in the ownership of the vessel, but these factors and contacts were not substantial enough to warrant retention of jurisdiction.

In the present action before this Court, the defendants have agreed to appear and defend any action commenced by plaintiff in Greece or Liberia.

This Court has stated in *Fitzgerald* v. *Texaco, Inc.*, 521 F. 2d 448, 1975 A.M.C. 1267 (2 Cir. 1975), cert. den. —— U.S. ——, 96 S. Ct. 781, 46 L. Ed. 641 at page 451:

> "Among the major factors bearing on the convenience of the parties are ease of access to sources of proof, the availability of compulsory process and the cost of obtaining willing witnesses. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 508, 67 S. Ct. 839, *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499 (2 Cir. 1966)."

And at page 454:

> "The broad principles of choice of law established for Jones Act cases in *Lauritzen* v. *Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), were declared equally applicable to cases arising under the general maritime law in *Romero* v. *International Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959), and have been applied to suits brought under the Death on the High Seas Act. *Symonnette Shipyards Ltd.* v. *Clark*, 365 F. 2d 464 (5 Cir. 1966).
>
> "The governing principle winnowed from these cases is that the plaintiffs can recover under the Death on the High Seas Act only if they are able to establish some significant national contacts warranting the application of the statute to non-resident aliens (citations omitted). The only American contact in this case is Texaco's alleged supervision of the search."

In *Xerakis* v. *Greek Line, Inc.,* 382 F. Supp. 774 (E.D. Pa. 1974), 1975 A.M.C. 644, the reason for not retaining jurisdiction in certain circumstances was well stated. That case involved a *Greek* seaman who jumped to his death from a *Liberian* vessel in *New York harbor.* In dismissing the case, Judge Higginbotham stated at page 777:

> "At oral argument plaintiff's counsel vigorously argued that the Greek law is inequitable, harsh, and unfair to seamen, in contrast to the more liberal benefits provided under the Jones Act. However, we live in an international community and by definition from the view of certain interests the laws of some other countries may be more or less favorable to that special interest. But we are not a super-court of international jurisdiction; and there is nothing in the record to suggest that a federal court in the United States can more wisely interpret Greek law than the Greek lawyers and jurists themselves—who would have to be called upon to define their law in any adjudication before us.
>
> "Despite the assertions of plaintiff's counsel, I do not conclude that she cannot get a fair trial in her own native land. It is not this court's responsibility that the Greek law is purportedly less liberal than the United States maritime law in the rights and benefits provided seamean. To try this case here under Greek law invades the prohibited area of which Justice Jackson spoke that 'the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy'. (*Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947)."

The Second Circuit has expressed the need for substantial contacts in order to warrant retention of jurisdiction

and that these should be something between minimal and preponderant contacts. *Bartholemew* v. *Universe Tankships, Inc.,* 263 F. 2d 437 (2d Cir. 1959), cert. den. 359 U.S. 1000. There is no such middle ground with regard to this case. The AQUACHARM and her owner's contacts consist of the vessel stopping at United States ports from time to time as outlined in the *Facts* of this brief.

In *Frangiskatos* v. *Liberian M/L Konkar Pioneer,* 353 F. Supp. 402 (SDNY 1972); aff'd, 471 F. 2d 714 (2 Cir. 1972), a *Greek* seaman sued the *Panamanian* owner of a *Liberian* flag vessel. In granting defendant's motion to dismiss on the ground of forum non conveniens, the District Court said at p. 404:

> ". . . Further, the motion for dismissal on the doctrine of forum non conveniens is also granted on the authority of *Gulf Oil Corp.* v. *Gilbert,* supra., since the facts in this case clearly dictate that private and public interests, including the congested calendars of this court, are best served by permitting this case to be litigated in Greece where all of the sources of proof are available."

Again, in *Lambiris* v. *Neptune Maritime Co.,* 38 App. Div. 2d 528, 326 NYS 2d 862 (1st Dept. 1971), 1972 A.M.C. 106, the Appellate Division of the State of New York, First Department, considered a personal injury action by a *Greek* seaman employed aboard a *Liberian* flag ship owned by a *Liberian* corporation with its principal place of business in *Switzerland.* The accident occurred in a *Venezuelan* port. In dismissing the action, the Court said at page 108 of 1972 A.M.C.:

> "The fact that plaintiff asserts a cause of action under the Jones Act does not require denial of the motion to dismiss based upon forum non conveniens where it appears as here, that the governing factors

> indicate that United States law should not apply . . . Moreover, it does not appear that plaintiff cannot bring his action in Switzerland where the defendant has its main office, nor does it conclusively appear that plaintiff may not bring action in his native country—Greece. In any event, the conditions under which we reverse adequately protect plaintiff if either of those countries do not have or fail to exercise jurisdiction."

In *Rodriguez* v. *Orion Schiffahrts-Gesellschaft Reith & Co.*, 348 F. Supp. 777 (SDNY 1972), the court declined jurisdiction even though injury occurred at a U. S. port and considerable medical care was received in the U. S. Judge Weinfeld said at page 779:

> "No witness to the accident resides at or near the place of its occurrence or in the United States . . . If the case were to be tried here, the testimony of all such witnesses would be by deposition and in a foreign tongue, which would require translation. So, too, were the case to be retained here, testimony of experts on the foreign law applicable to the case would be required and their depositions would involve translations, with the hazard inherent in translations of foreign law, so that the trial 'may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.'"

The reasoning behind the dismissal of certain actions on the ground of forum non conveniens was clearly discussed in *Leonard* v. *General Carriers,* 1975 A.M.C. 471 (N.D. Cal 1974). In that case, a Greek seaman on a Greek flag vessel was fatally injured aboard ship while in U. S. waters. The Court said at page 472-473:

> "There are only two factors connecting this action to the U. S. First, the accident occurred while defendant's ship was within the territorial waters of the U. S. This is not enough to support retention of jurisdiction. In *Zouras* v. *Menelaus Shipping Co.,* 1964 A.M.C. 1954, 336 F. 2d 209 (1 Cir. 1964), the Court indicated that, where the only contact between the U. S. forum and the cause of action was that the injury occurred in local territorial waters, the *Romero* case, supra., conclusively establishes that there are not sufficient contacts to posit application of the general maritime law of the U. S. and that a federal court should not retain jurisdiction in order to apply foreign law. *Second, the defendant's ship has called on American ports several times in the past. This also is not enough to support retention of jurisdiction even in connection with the fact that the accident in question occurred within American territorial waters.* (emphasis added). There is no evidence of when or where the M/V ISOBEL will next visit the U.S. This makes it difficult for the compulsory process of this court to reach the sources of proof. It will also be difficult for this Court to enforce a judgment in favor of plaintiff whereas such enforcement would be easier at defendant's principal place of business, Greece, which is also the survivor's residence."

In several of the above cited cases, the contacts with the U. S. were far stronger than in the case before this court and all the reasons for the court refusing to retain jurisdiction apply here with even greater force. Plaintiff is not without alternative forums within which to bring his claim and defendants have agreed to appear and defend in those forums.

There are numerous other cases supporting the same proposition as related under this *Point,* and some of them are: *Garis* v. *Compania Maritima,* 386 F. 2d 155 (2 Cir. 1967); *Orgettas* v. *S/T Crinis,* 488 F. 2d 89 (4 Cir. 1973); *Domingo* v. *States Marine Lines,* 340 F. Supp. 811, 1972 A.M.C. 937 (SDNY 1972); In re *Complaint of Lidoriki Maritime Corp.* (*Vessel Elias*) 404 F. Supp. 1402 (E.D. Pa. 1975) Greek flag, Greek crew, explosion in river in Pennsylvania, dismissed—forum non conveniens. *Koupetoris* v. *Konbar Intrepid Corp.,* 420 F. Supp. 951 (SDNY 1975) J. Pollack dismissed—forum non conveniens—Greek ship, Greek seaman, and said at page 955:

> "Nonetheless, where an alternative forum is available to the plaintiff in which all the sources of proof are available, a federal district court has 'unqualified discretion to decline jurisdiction in suits in admiralty between foreigners.'" (*Canada Molting Co.* v. *Paterson Steamships,* 285 U.S. 413 (1932).

It is important to note that the Supreme Court in *Lauritzen* v. *Larsen,* 345 U.S. 571 (1953) emphasized that the ability of a plaintiff to serve American process on a foreign vessel owner is not sufficient to bring a foreign transaction under American law. The Court said at page 590:

> "It is urged that, since an American forum has perfected its jurisdiction over the parties and defendant does more or less frequent and regular business within the forum state, it should apply its own law to the controversy between them. The 'doing business' which is enough to warrant service of process may fall quite short of the considerations necessary to bring extraterritorial torts to judgment under our law. Under respondent's contention, all that is necessary to bring a foreign transaction between foreigners in foreign ports under

> American law is to be able to serve American process on the defendant. We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. (cites omitted).
>
> "The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."

In the case of *Hellenic Lines Ltd.* v. *Rhoditis,* 398 U.S. 306 (1970), the court applied the seven factors of *Lauritzen* but also added an additional factor of "base of operations". In *Rhoditis* the shipowner owned 95% of the stock and was an American resident living in Connecticut since 1945, and the vessel made regular scheduled runs between the U.S. and foreign ports. In the instant case none of these elements is present and the factor of base of operations does not apply. It is quite apparent that *Rhoditis* does not in any way alter the basic premise that the instant lawsuit is wholly foreign to this jurisdiction, and that it should be dismissed without prejudice to the plaintiff commencing another action in Greece where the interested parties reside, and where the employment contract freely entered into by shipowner and employee, by its terms, agrees to litigate any disputes between the parties in Greece.

It is agreed that U.S. courts have jurisdiction over lawsuits involving maritime matters between foreigners, but such jurisdiction is within the discretion of the court.

POINT II

The Liberian Maritime Law does not preclude contracts of employment between crew members and their employer. However, the material point at issue is not whether plaintiff can obtain the same relief in a foreign forum as he might in the United States, but whether the connections with the United States are substantial enough to warrant retention of jurisdiction.

There is no quarrel that Liberia has adopted the maritime law of the United States just as any other country might choose to adopt our general maritime law. But that is not the touchstone in a motion to dismiss on the ground of forum non conveniens, because if it were our courts would not repeatedly dismiss actions for all of the reasons discussed under *Point I.*

It would be a simple but illogical view to say that if a foreign nation adopted our martime law then the United States should retain jurisdiction lest a foreign forum not provide adequate relief according to our standards. This watchdog of the world approach was rejected in *Xerakis,* supra, when Judge Higginbotham commented that this nation is not a super-court of interational jurisdiction. As stated before, dismissals on the ground of forum non conveniens have been ordered in cases where United States contacts were much more substantial than in this case.

Judge Motley, in her memorandum opinion in the instant action, stated:

> "This Court need not reach the question of whether Liberian law is the appropriate law to be applied here. However, it is clear that if the principle articulated by plaintiff were accepted by the

> Courts, the already overburdened judicial system of this country would find itself susceptible to taking over the litigative responsibilties of whatever other jurisdictions might deem it suitable to adopt laws based on American models. This clearly would not be an appropriate result." (39a, 40a).

Decedent, Mr. Karras, and the shipowner contracted specifically that Greek courts would provide the remedies for disputes. This was their right and the United States is not the world arbiter for determining those rights when its contacts with the case are insignificant. The shipowner has done business in United States ports as it has in countless foreign ports, since that is the nature of international shipping, but that does not automatically make the United States the proper forum for all litigation involving that shipowner contrary to the agreement of the parties. Whether the terms of the contract may or may not be contrary to the public policy of this country is not the prime consideration addressed to the sound discretion of the District Court in considering a motion to dismiss on the ground of forum non conveniens. As Judge Motley pointed out in her opinion:

> . . . "the questions involved go beyond a mere rote recitation of standard maritime law. Decedent signed a contract which included the terms of the Greek Collective System and which completely provide for the application of Greek law and the usage of Greek courts to resolve disputes. Whether or not such an agreement should be allowed to supercede the ordinary choice of law process, is an important question of public policy which ought not to be decided in a forum having little or no connection with the subject suit." (40a)

The single question presented by Appellant in his brief is whether it was error for the District Court to dismiss this action. The District Court in its discretion found that there were sufficient grounds and recited those grounds in a memorandum decision. Appellant has presented no proof that the District Court has so abused its discretion as to require reversal, and its determination should not be disturbed on appeal except for a clear abuse of discretion. 10 ALR Fed. S. 5 (p. 373); 1 Moore's Fed. Practice, S. 0.145(5), pp. 1619-1620.

Contractual agreements between shipowners and employees with provisions for foreign forums and application of foreign law are not void on their face. They may well be respected and enforced by the appropriate forum which hears the case, as being in accord with that forum's practices and public policy. (See *Stamatkos* v. *Hunter Shipping Co., S.A.,* 1972 AMC 1001 (E.D. Pa 1972); *Anastasiadis* v. *S.S. Little John,* 346 F. 2d 281, reh. den. 347 F. 2d 823, cert. den. 384 U.S. 920 (1965); *Damaskinos* v. *Societa Navagacion,* 1967 AMC 77 (SDNY 1966); *Poulos* v. *S.S. Ionic Coast,* 264 F. Supp. 237, 1967 AMC 1804 (E.D. La. 1967).

CONCLUSION

The Decision and Order of the District Court should be affirmed.

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